IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 466 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

STAT OFGUJRAT

Versus

JUGA BIJAL

Appearance:

MR A.J. DESAI, APP, for Petitioner

MR MAHENDRA K PATEL for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 31/08/98

ORAL JUDGEMENT

1. Range Forest Officer-Arjunsing Ravikant, as then head quartered at Dalkhania of Junagadh district, received an information on or round 7th March, 1987 that a lion is hunted in the forest area of Dalkhania. He also received names of 6 or 7 suspects. These people belonged to Dalkhania and Jamwala. He, therefore, went to Jamwala along with his staff including R.F.O. B.K. Patel. After reaching Jamwala, they took with them R.F.O. Mr. Vyas and then went to the house of Juga

Bijal, the present respondent. They entered the house. It was a two room house and in the second room, which was also used as kitchen, they found from a plastic bag one nail of lion, two nail covers of lion, a bunch of hair of lion bound by thread, two teeth of wild pig and a "Datardi". They also found pieces of horns of deer. They recovered these articles in presence of Panch witnesses by drawing a Panchnama. Statement of respondent-Juga Bijal was recorded and, ultimately, the Range Forest Officer lodged complaint with Judicial Magistrate, First Class, Una, against respondent-Juga Bija for offences under Sections 39(1)(b), 39(2), 39(3), 40(2), 43(1)(a), 44(1)(a) and (3), 52 and 57 of the Wild Life (Protection) Act, 1972.

2. The charge was framed against the accused vide Ex.4 by the learned Judicial Magistrate, First Class, Una, District Junagadh, on 5th December, 1987, to which the accused pleaded not guilty and expressed his desire to face the trial.

3. After considering the evidence, the learned Magistrate came to the conclusion that the prosecution had failed to establish the case against the accused and acquitted the accused for the offences with which he was charged by his judgment and order dated 18th May, 1989 in Criminal Case No.1114 of 1987. Being aggrieved by the said judgment and order, the State has preferred the present appeal.

4. Mr. A.J. Desai, learned Additional Public Prosecutor, has urged that the learned Magistrate has committed an error in not accepting the statement of the accused made before the Range Forest Officer on the ground that statement before Range Forest Officer cannot be proved by virtue of Sections 25 and 26 of the Indian Evidence Act. Mr. Desai also submitted that the learned Magistrate has committed an error in not considering the fact that the accused possessed nail of lion and other animal articles which are defined as Government property under the Wild Life (Protection) Act, 1972 (hereinafter referred to as "the Act") and, therefore, the recording of acquittal by the learned Magistrate is erroneous and may be set aside and the accused person-present respondent may be convicted for the offences with which he was charged.

5. Mr. M.K. Patel, learned advocate appearing for the respondent, has strongly opposed this appeal. According to him, the learned Magistrate has rightly arrived at the conclusion that Sections 25 and 26 of the

Indian Evidence Act would be attracted and, therefore, statement made before the Range Forest Officer cannot be looked into while deciding the matter. Mr. Patel submitted that the recovery of the muddamal article is not properly proved by the prosecution barring the deposition of the Range Forest Officer. The Panch witnesses have not supported the recovery and, therefore, the decision arrived at by the learned Magistrate does not call for any interference. The appeal may, therefore, be dismissed and the acquittal may be confirmed.

6. Interesting it is to note that the Regional Forest Officer, the complainant himself, who received the information about the killing of a lion within his territorial jurisdiction has not taken any steps to locate the dead body of the lion nor has he made any search therefor. He has instead chosen to go to Jamwala to investigate regarding the information received by him leaving aside the information regarding Dalkhania where he is located and then, ultimately, he is able to find from the house of the respondent the articles which are recovered by him by drawing a Panchnama.

7. However, this recovery is not proved as Panch witness-Bijal Rama, Ex.6 and Panch witness-Ranchhod Dhana, Ex.7 have not supported the prosecution case. They flatly denied to have gone to the house of the accused-respondent or any recovery being made in their presence. Likewise, witness-Rana Arjan, Ex.9 also denies to have gone anywhere with the Forest Officer. He denies that the accused persons had made any confessional statement.

8. The other witnesses examined are Aladad Makrani, Ex.15 and Janakkumar Narmadashankar Vyas, Ex.16, who are of the Forest Department, then working at Jamwala.

9. If Sections 25 and 26 of the Indian Evidence Act are considered, they relate to a confession made before Police Officer and provides that no such confession shall be proved against a person accused of any offence and that no confession of any person while he is in custody of a Police Officer shall be proved as against that person unless it is made in the immediate presence of a Magistrate.

10. The question, therefore, is whether a Forest Officer can be considered as a Police Officer. In this regard, the guidelines for considering this question are laid down by the Honourable Supreme Court in the Case of

Balkrishna A. Devidayal v. State of Maharashtra, 1981 SC 379. It is held therein that the primary test for determining whether an officer is a Police Officer is whether the officer concerned under the special Act has been invested with all the powers exercisable by an officer in-charge of a Police Station under Chapter XIV of the Code of Criminal Procedure qua investigation of offences under that Act, including the power to initiate prosecution by submitting a report (charge sheet) under Section 173 of the Code of Criminal Procedure, 1973. In order to bring him within the purview of term "Police Officer" for the purpose of Section 25 of the Evidence Act, it is not enough to show that he exercises some or even many of the powers of a Police Officer conducting an investigation under the Code. If provisions of the Act are considered, Section 50 of the Act empowers the Director or any other officer authorised by him in this behalf or the Chief Wild Life Warden or the Authorised Officer or any Forest Officer or any police officer not below the rank of Sub-Inspector to seize any captive animal, wild animal, animal article, meat, trophy, uncured trophy, specified plant or part of derivative thereof in respect of which the offence under this Act appears to have been committed. The section also empowers such officers to detain any person and several other powers. It is, therefore, amply clear that the officer of a Forest Department acting under this Act does not enjoy all the powers of a Police Station Officer although he enjoys some of them and, therefore, it cannot be said that a Forest Officer is a Police Officer. Resultantly, Section 25 or 26 of the Indian Evidence Act cannot be said to be attracted for a statement that may have been made by the accused person before the Forest Officer. In the instant case, therefore, the statement made by respondent, Mark-A, before the Forest Officer, therefore, cannot be said to be inadmissible in evidence as contemplated under Section 25 or 26 of the Indian Evidence Act, as has been held by the learned Magistrate. This finding of the learned Magistrate is, therefore, arrived at in a clear error of law.

10. It transpires from the evidence that the Panch witnesses have not supported the recovery. The only evidence is that of the personnel from the Forest Department and if that evidence is considered, it only speaks of recovery of the articles from the house of respondent. Of course, if the evidence of Arjunsinh Ravikant is closely examined, it transpires that he claims that he went to the house of the accused with staff members of the Forest Department. As against this, Range Forest Officer - Bhikha Ramji denies to have

accompanied the complainant. He says that the Forest Staff of Jamwala was taken help of at the relevant time. The complainant states that he had inquired at the house of other suspects but that part is not supported by the other witnesses. The evidence regarding calling of Panch witness is also contradictory. According to Bhikhabhai, the complainant and his companions had started from Dalkhania at night and reached Jamwala at night only and after discussing with local Forest Officers, conducted the raid at 7 a.m. in the next morning. Against this, depositions of Aladad Janmohmad Makrani, Ex.15 and J.N. Vyas, Ex.16 amplifies that the complainant and B.K. Gor reached Jamwala at 10 a.m. and the raid was conducted at about 11 a.m. The whole genesis, therefore, of the incident is under cloud of doubt.

11. Besides, this, the accused is charged to have committed offences under Sections 39(1)(b), 39(2), 39(3), 40(2), 43(1)(a), 44(1)(a)(3), 52 and 57 of the Act, which are punishable under Section 51 of the said Act.

11.1 Before considering these provisions, it may be stated that the prosecution has failed to establish or bring on record by an independent cogent evidence the origin of the articles which are alleged to have been found from possession of the accused. The prosecution has also failed to bring on record by independent cogent evidence the time since when the accused is alleged to have possessed the muddamal articles. The only evidence is that of the Forest Officers that they found accused no.1 to be in possession of these articles. Apart from the above evidence, there is statement of the accused, Mark-A, which requires consideration to find out whether an offence is proved against the accused which he is alleged to have committed.

12. Since the prosecution has not been able to establish the origin or source of the accused acquiring the alleged possession of the muddamal articles, it is difficult to accept that an offence of possessing the Government property without any licence or permit is proved to have been committed by the accused-respondent. To establish this offence the prosecution ought to have established that the muddamal article which is seized is the Government property as envisaged under Section 39 of the Act. Section 39 of the Act contemplates any animal article, trophy or uncured or meat derived from any wild animal other than vermin which may have been hunted under Section 11 or subsection (1) of Section 29 of subsection (6) of Section 35 of the said Act. Since there is no evidence wherefrom these articles came and since it is

not the case of the prosecution that it was only out hunting as envisaged under Section 39(1)(a) of the Act that the articles were derived from, it cannot be said that the prosecution is able to establish the offence with which the accused is charged. Breach of Section 39(1)(a) 39(2) or 39(3), therefore, cannot be said to have been established by the prosecution.

13. Now, coming to the provisions of Section 40, subsection (2), it provides that no person shall, after the commencement of the Act, acquire, receive or keep in his control, custody or possession, sell, offer for sale or otherwise transfer or transport any animal specified in Schedule I or Part II of Schedule II or any uncured trophy or meat derived from such animal or the salted or dried skins of such animal or the musk of the musk deer or the horn of a rhinoceros, except with the previous permission in writing of the Chief Wild Life Warden or the Authorised Officer.

13.1 In this regard, if the evidence is considered, it is evident that the evidence of independent witness does not support the prosecution case. The evidence that is emerging through the Authorised Officer is self-contradictory and the very factum of drawing of Panchnama, its time and consequently its genesis is under a cloud of doubt. Therefore, this evidence cannot be considered as sufficient to establish the guilt of the respondent.

13.2 At this stage, the statement of respondent, Mark-A, may be taken into consideration. A prominent & salient feature in respect of this statement is that writing and the contents of this statement are not proved by the prosecution and the learned Magistrate has also, therefore, rightly not taken the statement on record and has not given an exhibit to it. As such, it cannot be looked into. Even otherwise, it is risky to place blind reliance on this statement only since the evidence of Forest Officer is otherwise found to be not beyond shadow of doubt. If the statement was recorded in presence of Panch and other witnesses, it ought to have been got countersigned by those independent witnesses. Those independent witnesses do not say anything about recording of statement by the accused. On the contrary, witness-Ranchhod Dhana categorically denies suggestion that explanation of the accused was sought in respect of the alleged possession. Under these circumstances, the statement at Mark "A" made before Officer of Forest Department cannot be looked into not because it is hit by Section 25 or Section 26 of the Indian Evidence Act but

because it is otherwise found to be not proved and not reliable.

14. As regards the other offences, namely, offence under Section 43(1)(a), it relates to transfer of animals and, therefore, will not be attracted. Likewise, Sections 44(1)(a) and 44(3) relate to dealings in trophy and animal article without licence will also not be attracted as there is no evidence to show that the accused was dealing in this type of articles. Section 52 relates to abetment or attempts. When principal offence is not established, there is no question of any attempt or abetment. Likewise, Section 57 relates to presumption. When the prosecution has failed to establish possession, this section will be be attracted.

15. In view of the above discussion, although for different reasons, the final conclusion arrived at by the learned Magistrate cannot be said to erroneous and, therefore, the appeal cannot be entertained. The prosecution has factually failed to prove the guilt of the accused and the charge against the accused. As a necessary consequence, the case must result into acquittal, as has been done by the learned Magistrate and, therefore, the decision of the learned Magistrate of acquitting the accused is to be upheld. The appeal, therefore, must fail and is hereby dismissed.

[A.L. DAVE, J.]
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